January 30, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Regulation B: Docket No. R-1168
Regulation E: Docket No. R-1169
Regulation M: Docket No. R-1170
Regulation Z: Docket No. R-1167
Regulation DD: Docket No. R-1171

Re: "Clear & Conspicuous Disclosures"

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the Federal Reserve's proposed revisions to five regulations regarding consumer disclosures. The Federal Reserve proposes to institute a single standard for "clear and conspicuous" disclosures for six different consumer regulations by revising five regulations to incorporate the existing definition and standards set forth in Regulation P. The Federal Reserve is also proposing guidance for Regulation Z to clarify that the term "amount" means a numerical figure and how the right of rescission operates, and is seeking information on the use of debt cancellation contracts and debt suspension agreements.

For a number of years, the ICBA has urged federal regulators to implement standard terminology and definitions where possible. While the ICBA generally believes that consistency in regulatory definitions is appropriate and can serve to reduce regulatory burden and cost, we are very concerned that this proposal may produce the unintended consequence of imposing time-consuming and costly review and revisions to existing disclosures to ensure compliance with a new standard. Some of the existing disclosures, such as those mandated under the Truth-in-Lending Act and the Federal

[1] ICBA is the nation's leading voice for community banks and the only national trade association dedicated exclusively to protecting the interests of the community banking industry. ICBA has nearly 4,600 members with branches in more than 17,000 locations nationwide. Our members hold more than $526 billion in insured deposits, $728 billion in assets and more than $405 billion in loans for consumers, small businesses, and farms. They employ more than 231,000 people in the communities they serve.

Reserve's Regulation Z, have been in existence and used for many years. A new and different standard that applies to those disclosures would call into question whether the existing disclosures are sufficient. Therefore, unless the Federal Reserve can ensure that the changes will not require review and revision of existing disclosures that have been acceptable under current standards and definitions, we recommend the proposal on "clear and conspicuous" disclosures be withdrawn.

We do not object to the additional changes recommended for Regulation Z, but we believe additional guidance is needed to protect the interests of banks when a consumer rescinds a loan.

Clear and Conspicuous

Five specific consumer protection regulations issued by the Federal Reserve require disclosures that must be made in a clear and conspicuous manner (Regulation B, Equal Credit Opportunity Act; Regulation E, Electronic Fund Transfers Act; Regulation M, Consumer Leasing Act; Regulation Z, Truth in Lending Act; and Regulation DD, Truth in Savings Act). The Federal Reserve states that while the current standards are similar, they are not identical.[2]

The Federal Reserve believes that the standard for "clear and conspicuous" disclosures implemented as part of Regulation P (Privacy) offers the best guidance on what is meant by "clear and conspicuous." Therefore, the agency proposes revising the other regulations using the same standard.[3] The Federal Reserve does not believe these changes will have a significant impact on regulatory burden and no substantive changes are intended nor do the proposals add format requirements where none currently exist.

As a general rule, the ICBA believes it helpful to have a single definition. Having a single definition for various regulations facilitates bank compliance and diminishes differing and possibly conflicting interpretations between what constitutes "clear and conspicuous" under different regulations. The ICBA also agrees that the current definition of "clear and conspicuous" used for Regulation P (Privacy) is an appropriate standard to apply to the other regulations since it is the best defined and most clearly articulated definition as well as being the most recently implemented standard. However, it is important that the Federal Reserve recognize that this change, however minimal it may seem, will require banks to review and possibly revise forms and disclosure statements to ensure compliance with the new standard. Even though no substantive changes may be intended, the resulting burden could be substantial.

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[2] Currently, Regulation B requires information provided in writing in a clear and conspicuous manner, while the staff commentary for Regulations B, M, and Z provide that disclosures must be in a "reasonably understandable form" and Regulation DD requires disclosures must be in a format that allows consumers "to readily understand the terms of their accounts."

[3] The stated purpose for the revisions is twofold: to help ensure consumers receive noticeable and understandable information required by law in connection with obtaining consumer financial products and services and to develop consistency among regulations to facilitate compliance by banks.

Overall, this is likely to be a time-consuming and expensive proposition, especially for community banks.

At a minimum, a substantial transition period will be needed. Even though many community banks use computer-generated forms provided by outside vendors, vendors would need time to make changes, update software programs and distribute those changes to banks. And, once changes have been implemented, bank staff will need to be trained on use of the new format. Therefore, the ICBA recommends that the Federal Reserve withdraw the proposal for additional study on the potential impact of the changes before moving forward.

Two possible approaches might be considered to resolve this dilemma. The first would be to incorporate these changes over time as each regulation undergoes its regular periodic review and analysis. That would allow the industry time to incorporate these revisions gradually and over time. A second approach would be to clearly specify that the revisions are not substantive, and that disclosure formats acceptable under the existing regulations are acceptable under the revised definition.

Following are our comments on specific elements of the proposed changes.

Standards for "Clear and Conspicuous"

The revisions would establish that clear and conspicuous means a disclosure that is "reasonably understandable and designed to call attention to the nature and significance of the information in the disclosure."

The proposal would provide some guidance by updating the commentaries to the various regulations to outline that the standard would be met by: using clear and concise language; short explanatory sentences or bullet lists; everyday words and active voice; avoiding multiple negatives or highly technical or legal jargon; and precision in explanation to avoid possible multiple interpretations. To avoid any questions, the ICBA recommends that the Federal Reserve stress that these are *examples* of disclosure formats that are acceptable, and that banks need not incorporate each and every element in the examples to provide "clear and conspicuous" disclosures.

For example, highlighting and bolding may be useful, but not if too much is highlighted or bolded. And, while avoiding legal terminology may be a worthwhile goal, it may not always be possible. For example, the term "adverse action" notice carries with it a set of connotations that may not be readily apparent to the average consumer. Most consumers would likely use a simpler term to explain what is occurring, but that would not incorporate the legal ramifications associated with the term. This is true of many phrases, as can be seen in the model language provided for Regulation P (Privacy) disclosures, the model for the proposed changes. Simple English might

convey the thought much more clearly, but would not necessarily convey the same meaning as the legal term.

To the extent that it has not already done so, the ICBA urges the Federal Reserve to develop model language and sample forms that banks may draw on for each of the regulations changed by the proposed revisions, with compliance deferred until the Federal Reserve develops such templates. This is especially important for community banks that have limited resources and that rely on the model language developed by the regulatory agencies to ensure compliance.

Designed to Call Attention

The commentaries would also be updated to say that "designed to call attention" means: plain-language headings to call attention to the disclosures; easily read typeface (with a suggestion that disclosures in smaller than 8-point font would probably be too small to satisfy the standard); use of wide margins and ample line spacing; use of boldface or italics for key words; and when other information is presented, distinctive type or other devices to call attention to the disclosures.

The ICBA believes this guidance is useful, but has some concerns. For example, the use of wide margins and ample line spacing may produce very lengthy documents for some disclosure statement and may cause documents currently printed on a single sheet to become multi-page documents. Although the guidance serves to point out stylistic and graphical mechanisms that should be considered for rendering clear, conspicuous and understandable disclosures, the ICBA urges the Federal Reserve to stress that these are *examples* of disclosure formats and that banks need not incorporate every element to have "clear and conspicuous" disclosures.

The ICBA agrees that a specific type size should not be established, but that a standard providing that print smaller than 8-point type is probably too small is appropriate. Anything less than 8-point type is difficult to read and is smaller than the font used for texts in typical paperback books or magazines. Academic standards limit this size type to footnote superscripts, and anything smaller should be considered the proverbial "fine print." The only area where an 8-point standard might be too restrictive would be print media that involves limited space, but even there, resorting to "mouse print" is inappropriate for disclosing important information to current or potential customers. Ultimately, though, to permit sufficient flexibility and to encourage creativity in use of graphics for disclosures, the ICBA agrees that suggesting that "no print smaller than 8-point" is a guideline and not a hard and fast rule is the preferred approach.

Other Information

The revisions would make it clear that banks are not barred from adding additional information to required disclosures. However, the presence of other information would be a factor to be used when determining whether the disclosures are clear and conspicuous.

While the ICBA does not object to this provision, determining the extent to which other information may be included without diminishing the clear and conspicuous nature of the disclosures is subjective, and a bank that adds verbiage or other information to the mandatory disclosures runs the risk that an examiner will determine the bank is violating the standard. The danger is that bankers, to avoid this risk, will segregate all disclosures from other documents that will increase cost and burden and may not be the most productive means to communicate the information to consumers.

Electronic Disclosures

Finally, the proposal states that guidance on the "clear and conspicuous" standard for electronic disclosures will be considered in the context of rulemakings that specifically address electronic delivery of disclosures.

The ICBA agrees with this approach. Due to their unique delivery mechanisms and formats, electronic media present different concerns. The normal components of traditional print media, such as typefaces, appear differently on computer or ATM screens, and those differences need to be taken into account. Moreover, electronic media offer non-traditional ways to presenting information, such as streaming video, animation, and other devices, that should be factored into the equation for assessing whether information is presented in a manner designed to call attention to the disclosures. However, since Internet banking is rapidly gaining popularity, the Federal Reserve should address this issue in the near future.

Additional Proposals Under Regulation Z

Amount

Because there has been some confusion about whether a narrative description satisfies the requirement for disclosing an "amount," the proposal would add an additional interpretation under Regulation Z to clarify that the word "amount" means a numerical figure. The Fed believes that a narrative description might be confusing to consumers and is not in keeping with the underlying intentions of the statute.

The ICBA finds it appropriate to incorporate this clarification.

Right of Rescission

In certain loans secured by real estate, Regulation Z and the Truth in Lending Act allow consumers three days to rescind the loan. To provide additional guidance on how this right operates, the Fed is proposing two changes to the staff commentary.

The first change would provide that where a lender fails to provide a borrower with a designated address for sending the rescission and the consumer sends the rescission notice to someone other than the lender or the lender's assignee, such as a third-party servicer, state law will determine whether delivery of the notice to that person is sufficient.

Although the ICBA does not object to this approach, it is important to recognize that this may be a source of confusion for banks that operate in more than one jurisdiction since it presents the opportunity for conflicting requirements. A single uniform standard would be preferable and easier to apply. And, since the requirement is federal, it would be appropriate for the Federal Reserve to establish the standard.

The second change would apply to the sequence of events when a loan is rescinded. Generally, when a consumer rescinds a loan, the consumer must return the principal balance to the lender, the lender must return all fees and charges to the borrower and the lien on the property is cancelled. The proposed guidance would provide that these events might occur out of sequence *under court order*. For example, a bankruptcy court may prevent the return of funds to the lender but order the lien released while the funds are held in escrow. In other instances, it may be necessary for the lender to release the lien to allow the borrower to obtain the funds needed to repay the principal balance. The guidance would specify that the fact that the events occurred outside of the generally mandated sequence does not affect the consumer's right to rescind the loan.

The ICBA is concerned that this guidance, without more, may possibly jeopardize banks' ability to ensure that the principal balance is returned as required. If the lien must be released before the balance is returned, then there should be additional steps required, such as the creation of an escrow account, to ensure that the bank is protected. It also should be very clear that this is an extraordinary provision that is restricted to unique situations, such as the order of a bankruptcy court where the intervention of the legal process and the supervision of a court offer additional protections for the bank's rights. Otherwise, allowing the release of a lien without sufficient protections, even though the loan has been rescinded, might leave the bank exposed to loss through fraud or other factors.

Conclusion

From an intellectual standpoint, the concept of uniformity and additional guidance on regulatory definitions is appealing. However, the standards in question and the application of "clear and conspicuous" to varied regulatory disclosures is not a definition that is being adopted in a vacuum. Rather, it would be overlaid on many years of existing application and disclosure formats that have been deemed acceptable.

Whenever regulatory standards are changed, bankers are at risk. The process of reviewing all current disclosures to ensure compliance will be time-consuming, costly and burdensome. Most disclosures that banks currently use have been reviewed by examiners and deemed acceptable, but we are concerned that may not be the case under the new standards. And, any changes may be subject to examiner criticism.

Therefore, the ICBA recommends that the proposal be withdrawn unless the Federal Reserve can clearly establish that there is no substantive change and that

disclosure formats that are considered acceptable under the current definitions will also be considered acceptable under the new definitions.

If you have any questions or need any additional information, please contact Robert Rowe, ICBA's regulatory counsel, at 202-659-8111 or robert.rowe@icba.org.

Thank you for the opportunity to comment.

Sincerely,

C. R. Cloutier
Chairman